No. 99-60

(3)

Supreme Court, U.S.
FILED
AUG 4 1999
CLERK

In The
SUPREME COURT OF THE UNITED STATES

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

MEMPHIS AND SHELBY COUNTY BOARD
OF ADJUSTMENT; AND
CITY OF MEMPHIS, TENNESSEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Of Counsel:
Mary V. DiCrescenzo
Duane J. Desiderio
National Association
of Home Builders
1201 15th St., N.W.
Washington, DC 20005

Gus Bauman
(*Counsel of Record*)
Justin A. Savage
Beveridge & Diamond, P.C.
1350 I St., N.W., Suite 700
Washington, DC 20005
(202) 789-6000

August 4, 1999

25pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE WRIT 3

I. THE INTERSECTION OF *WILLIAMSON COUNTY'S* RIPENESS REQUIREMENT WITH THE FULL FAITH AND CREDIT ACT HAS CREATED CONFLICT AND UNCERTAINTY AMONG THE LOWER COURTS 3

A. *Williamson County* Held that a Federal Takings Claim Accrues Only Upon the Claimant Exhausting State Judicial Proceedings for Compensation Without Discussing the Effect of the Full Faith and Credit Act 3

B. Lower Courts Conflict in Resolving the Intersection of *Williamson County's* Ripeness Requirement with the Full Faith and Credit Act 6

C. The Confusion in the Lower Federal Courts Often Denies Landowners *Any* Meaningful Forum in Which to Seek Just Compensation for Confiscation of Their Property 11

II. THE LOWER COURT MISAPPLIED *WILLIAMSON COUNTY*, UNASSAILABLE PRECEPTS OF *RES JUDICATA*, AND THIS COURT'S FULL FAITH AND CREDIT ACT JURISPRUDENCE 13

CONCLUSION 17

TABLE OF AUTHORITIES

FEDERAL CASES

Agins v. City of Tiburon,
447 U.S. 255 (1980) 1

Allen v. McCurry,
449 U.S. 90 (1980) ..... *passim*

Bidison v. City of Chicago,
921 F.2d 724 (7th Cir. 1991) 15

City of Chicago v. International College of Surgeons,
118 S. Ct. 523 (1997) 13

City of Monterey v. Del Monte Dunes at Monterey,
119 S. Ct. 1624 (1999) 2

Corn v. City of Lauderdale Lakes,
904 F.2d 585 (11th Cir. 1990) 15

Dodd v. Hood River County,
136 F.3d 1219 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 278 (1998) 9, 13

Dodd v. Hood River County,
59 F.3d 852 (9th Cir. 1995), *cert. denied*, 119 S.Ct. 278 (1998) 8, 13

Dolan v. City of Tigard,
512 U.S. 374 (1994) 2, 11

England v. Louisiana State Board of Medical Examiners,
375 U.S. 411 (1964) 10, 11

Fields v. Sarasota Manatee Airport Authority,
953 F.2d 1299 (11th Cir. 1992) 9, 10

First English Evangelical Lutheran Church of Glendale v. Los Angeles County,
482 U.S. 304 (1987) 1

Front Royal & Warren County Industry Park Corporation v. Town of Front Royal,
135 F.3d 275 (4th Cir. 1998) 10

Griffin v. State of Rhode Island,
760 F.2d 359 (1st Cir. 1985) 10

Jennings v. Caddo Parish School Board,
531 F.2d 1331 (5th Cir. 1976) 9

Kremer v. Chemical Const. Corp.,
456 U.S. 460 (1982) 5

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 1

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340 (1986) 1

Macri v. King County,
110 F.3d 1496 (9th Cir. 1997) 12

Macri v. King County,
126 F.3d 1125 (9th Cir. 1997), *cert. denied,*
118 S. Ct. 1178 (1998) 8, 9

Marresse v. American Academy of Orthopaedic Surgeons,
470 U.S. 373 (1985) 5, 13

Matsushita Electrical Industrial Co. v. Epstein,
516 U.S. 367 (1996) 5

Midnight Sessions, LTD. v. City of Philadelphia,
945 F.2d 667 (3d Cir. 1991) 7

Migra v. Warren City School District Board of Education,
465 U.S. 75 (1984) ..... *passim*

Monroe v. Pape,
365 U.S. 167 (1961), *overruled in part on other grounds, Monell v. Department of Social Services*,
436 U.S. 658 (1978) 4

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 1

Palomar Mobilehome Park Association,
989 F.2d 362 (9th Cir. 1993) 8, 15, 16

Parsons Steel, Inc. v. First Alabama Bank,
474 U.S. 518 (1986) 5

Patsy v. Board of Regents,
457 U.S. 496 (1982) 4

Peduto v. City of North Wildwood,
878 F.2d 725 (3d Cir. 1989) 7, 8, 16

Pennell v. City of San Jose,
485 U.S. 1 (1988) 1

Railroad Commission v. Pullman,
312 U.S. 496 (1941) 10

San Diego Gas and Electric Co. v. City of San Diego,
450 U.S. 621 (1981) 1

Schulz v. Milne,
No. 95-15703, 1996 WL 570,498 (9th Cir. Oct. 3, 1996) 12, 15

Seiler v. Charter Township of Northville,
___ F. Supp. 2d ___, 1999 WL 420,985 (E.D. Mich. June 23, 1999) 12

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) 2, 4

Wilkinson v. Pitkin County Board of County Commissioners,
142 F.3d 1319 (10th Cir. 1998) 10, 15, 16

Williamson County Regional Planning Commission v. Hamilton Bank,
473 U.S. 172 (1985) ..... *passim*

STATE CASES

American Nat'l Bank & Trust Co. v. Clark,
586 S.W.2d 825 (Tenn. 1979) 14

Lien v. Couch,
993 S.W.2d 53 (Tenn. Ct. App. 1998) 14

Richardson v. Tennessee Bd. of Dentistry,
913 S.W.2d 446 (Tenn. 1995) 14

White v. White,
876 S.W.2d 837 (Tenn. 1994) 14

STATUTES

28 U.S.C. § 1738 ..... *passim*

42 U.S.C. § 1983 ..... *passim*

MISCELLANEOUS

John J. Delaney and Duane J. Desiderio, *Who Will Clean Up the 'Ripeness Mess?' A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urban Lawyer 195 (1999) 7, 12

The Federalist No. 54, at 339 (James Madison), *quoted in Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573 (Fed. Cir. 1993) 11

Robert Meltz, Dwight Merriam, & Richard Frank, *The Takings Issue* (1999) 12

Petitioner's Brief, App. A 6, 16

Petitioner's Brief, App. B 16

Restatement (Second) of Judgments § 20(2) (1982) 14

Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1 (1995) 12

18 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction and Related Matters* § 4406 (1981) 14

18 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction and Related Matters* § 4412 (1999 Supp.) 14

INTEREST OF THE AMICUS CURIAE

The *amicus* has received the parties' written consent to submit this brief.[1] Letters of consent have been filed with the Clerk of this Court.

The National Association of Home Builders ("NAHB") represents over 195,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has appeared before this Court as an *amicus curiae* or as "of counsel" on behalf of the property owner in prior takings cases involving land use regulation. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981);[2] *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987);[3] *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Lucas v. South Carolina Coastal Council*,

---

[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and *amicus* paid for it. This brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

[2] Justice Brennan's dissent cited approvingly the NAHB brief. 450 U.S. at 643 n.6.

[3] The Court opinion cited approvingly the NAHB brief. 483 U.S. at 840.

505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey v. Del Monte Dunes at Monterey*, 119 S. Ct. 1624 (1999).

The decision of the Circuit Court below, although extreme in its outcome (the city concedes it violated the property owner's constitutional rights but no remedy is available in either state or federal court), is not atypical in the singular world of constitutional land use law. Since this Court decided *Williamson County*, lower circuit courts facing regulatory taking actions have twisted *Williamson County's* ripeness requirement into a *res judicata* barrier, preventing property owning citizens any chance of seeking just compensation under 42 U.S.C. § 1983 for violations of their Fifth and Fourteenth Amendments rights. The *amicus*, on behalf of many of those property owning citizens, explicates for this Court the conflicts and confusion of the lower federal courts in this arena of the Bill of Rights.

SUMMARY OF ARGUMENT

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that a takings claim only becomes ripe for adjudication in federal court if a landowner first seeks and has been denied just compensation in state court. This Court, however, did not discuss the interaction between this ripeness requirement and the Full Faith and Credit Act ("FFCA" or "Act"), 28 U.S.C. § 1738. That Act generally requires federal courts to apply to a prior state court judgment the *res judicata* and collateral estoppel rules of the state issuing the judgment.

Despite this silence, this Court could not have intended *Williamson County* to push injured landowners into a pointless

judicial maze, which is what the lower court has done. The growing conflict and confusion among the federal circuits on the issue of ripeness and the Takings Clause has led to the Sixth Circuit ruling that, even where a city concedes it violated a citizen's constitutional rights, no meaningful forum is available to a property owner to remedy that violation.

The Sixth Circuit also misapplied *Williamson County*, this Court's FFCA jurisprudence, and Tennessee's *res judicata* principles. Under Tennessee law, a judgment cannot bar a claim that has yet to accrue. *Williamson County* made clear that a federal takings claim does not ripen or accrue until the landowner concludes state court litigation seeking just compensation. By holding to the contrary, the Sixth Circuit violated the FFCA, which prohibits a federal court from giving more preclusive effect to a state court judgment than the courts of the state rendering the judgment.

REASONS FOR GRANTING THE WRIT

I. THE INTERSECTION OF *WILLIAMSON COUNTY'S* RIPENESS REQUIREMENT WITH THE FULL FAITH AND CREDIT ACT HAS CREATED CONFLICT AND UNCERTAINTY AMONG THE LOWER COURTS

A. *Williamson County* Held that a Federal Takings Claim Accrues Only Upon the Claimant Exhausting State Judicial Proceedings for Compensation Without Discussing the Effect of the Full Faith and Credit Act

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court announced

a two part test that landowners must satisfy before their takings claims are "ripe" for adjudication in federal court.

Ripeness first requires that "the government entity charged with implementing the regulations [must] ha[ve] reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. This prong of *Williamson County* is not at issue here. *See generally Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (discussing this prong of the *Williamson County* ripeness test).

Instead, the Petition for Writ of Certiorari centers on the confusing and conflicting interpretations of the second prong of the *Williamson County* ripeness test: the landowner must "seek compensation through the procedures the State has provided for doing so" before bringing a takings claim in federal court pursuant to 42 U.S.C. § 1983. *Williamson County*, 473 U.S. at 194. Although all other constitutional violations do not have to be first litigated in state court before seeking a federal forum,[4] this Court reasoned that the "nature" of the Takings Clause required otherwise; the Fifth Amendment does not prohibit takings, but rather "takings *without just compensation* . . . ." *Id.* at 194 & n.13. Accordingly, this Court held that "*no constitutional violation occurs until* just compensation has been denied" in state court because "the State's action . . . is not complete until the State fails to provide adequate compensation for the taking." *Id.* at 194 n.13, 195 (emphasis added) (internal quotation marks and citation omitted).

---

[4] *See, e.g., Patsy v. Board of Regents*, 457 U.S. 496, 504 (1982); *Monroe v. Pape*, 365 U.S. 167, 183 (1961), *overruled in part on other grounds, Monell v. Department of Social Servs.*, 436 U.S. 658, 695-701 (1978).

This Court did not explain how to reconcile this ripeness requirement with the Full Faith and Credit Act ("FFCA" or "Act"), 28 U.S.C. § 1738.[5] Under the FFCA, "a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986). Thus, a federal court applies the *res judicata* and collateral estoppel rules "chosen by the State from which the judgment is taken." *Marresse v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985).[6]

Compounding the silence on the FFCA issue, this Court had previously held in two distinguishable cases that the Act required the application of state preclusion rules to Section 1983 claims brought for certain constitutional violations. *See Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980). As explained below in Part II, *McCurry* and *Migra* only heightened

---

[5] The Act provides:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

[6] However, a federal court must not apply the FFCA when (1) the party against whom judgment was entered lacked a "full and fair opportunity" to litigate the claim or issue, *see, e.g., Kremer v. Chemical Const. Corp.*, 456 U.S. 460, 480 (1982) (citation omitted); or (2) another federal statute creates an "implied partial repeal" of the FFCA, *see, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 380 (1996) (citation omitted).

the *Williamson County* confusion because neither involved a constitutional violation such as a takings claim that requires, as an element of recovery, prior litigation in state court. *Migra*, moreover, clarified that the FFCA applies to a Section 1983 claim only when a litigant first seeks to voluntarily litigate in state court, whereas *Williamson County* forces landowners to first litigate in state court before seeking redress in a federal court.

Thus, for the last fourteen years, lower courts have differed over how to apply *Williamson County's* ripeness requirement in light of the FFCA, *McCurry*, and *Migra*. These jurisprudential differences have become a thicket of conflicting holdings, principles, and exceptions, leaving landowners without any clear guidance regarding the proper forum and procedure for challenging unconstitutional confiscations of their property.

B. Lower Courts Conflict in Resolving the Intersection of *Williamson County's* Ripeness Requirement with the Full Faith and Credit Act

In this case, the Sixth Circuit held that once a landowner has "ripened" its takings claim under *Williamson County* by first bringing state court litigation, the landowner's claim immediately becomes "rotten" because of the FFCA's imposition of state *res judicata* rules, even when, as here, the defending locality stipulated that it violated the landowner's constitutional rights. *See* Petitioner's Brief, App. A, at 4-7. Furthermore, the Sixth Circuit's opinion suggested that the lower federal courts should only review "ripened" takings claims to determine whether the ripening process in state court complied with "the minimum procedural requirements" of due process. *Id.* at 6 (internal quotation marks and citation omitted).

In so holding, the Sixth Circuit reflects a misunderstanding of *Williamson County* and the FFCA seemingly shared by the Third Circuit. In *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989), the landowners ripened their takings claim by seeking just compensation in New Jersey state court before filing suit in federal court. *See id.* at 726-27. But the district court and Third Circuit dismissed this ripened claim as barred by *res judicata*. *See id.* at 727-29. According to the Third Circuit, the very act of ripening the takings claim - the "hear[ing]" and "reject[ion]" of the takings claim "on the merits" in state court - also barred that claim. *See id.* at 728. When the landowners pointed out that the court's misreading of *Williamson County* and the FFCA would "deny [landowners] a federal forum," the Third Circuit candidly rejoined that "[d]enial of a federal forum, however, does not amount to denial of due process." *Id.* at 728-29.

Apparently, however, the same federal court is more open to some than to others. In *Midnight Sessions, LTD. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991), the court reviewed the merits of a claim that a city's denial of a business license for a dance hall constituted a taking, even though the plaintiffs had not brought their takings claim in state court first. *See id.* at 675-79. This inconsistency simply reflects the "lower courts' condescension against constitutional land use matters,"[7] so much so that dance hall operators receive a takings adjudication on the merits in the Third Circuit, while landowners denied the ability to use their real property must shuffle back and forth between federal and state courts.

---

[7] Testimony of Professor Daniel R. Mandelker on H.R. 1534 Before the House Judiciary Committee (Sept. 23, 1997), *reprinted in* John J. Delaney and Duane J. Desiderio, *Who Will Clean Up the 'Ripeness Mess?' A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urban Lawyer 195, 237 (1999).

Similarly, the Ninth Circuit has been inconsistent in resolving the tension between the FFCA and *Williamson County*. In fact, the Ninth Circuit, has both followed and rejected the Third Circuit's opinion in *Peduto*. In *Palomar Mobilehome Park Association v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993), the Ninth Circuit relied heavily on *Peduto* in holding that the FFCA required it to apply *res judicata* to a landowner's takings claim that had first been ripened in state court. Yet in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*"Dodd I"*), *cert. denied*, 119 S. Ct. 278 (1998), the same court rejected the "suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment takings plaintiffs and that any federal remedy is limited to actions based on inadequate taking procedures in the state." *Id.* at 861. This flatly contradicts the Third Circuit's interpretation of *Williamson County* in *Peduto*: "Appellants have exhausted their state claims, which, under *Williamson*, is a necessary predicate to their federal cause of action; but in doing so, they received a full and fair adjudication of their constitutional claims . . . . Due process . . . entitles them to no more." 878 F.2d at 729.

The Ninth Circuit has further disagreed with itself regarding whether a landowner may "reserve" a federal takings claim for federal court adjudication while pursuing the state court proceedings mandated by *Williamson County*. In *Dodd I*, the Ninth Circuit held that state *res judicata* principles did not bar the Dodds' federal takings claim because the Dodds filed a written "reservation" informing the court that they intended to litigate their federal takings claim in federal court. Subsequently, a different panel of the Ninth Circuit in *Macri v. King County*, 126 F.3d 1125, 1130 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1178 (1998), noted that *Dodd I* "clearly holds that a court can reserve a federal issue so that the issue will not be precluded from further litigation despite [an] assertion that [a]

federal claim will necessarily be precluded by res judicata." *Id.* at 1130 n.7. But then in a subsequent opinion, the original panel in *Dodd I* held that state principles of collateral estoppel barred the Dodds' takings claim, despite the reservation, without even mentioning *Macri*. *See Dodd v. Hood River County*, 136 F.3d 1219, 1224-28 (9th Cir. 1998) ("*Dodd II*"), *cert. denied*, 119 S. Ct. 278 (1998).

Relying on the Ninth Circuit's decision in *Palomar* and the Third Circuit's decision in *Peduto*, the Tenth Circuit barred landowners' ripened takings claims in *Wilkinson v. Pitkin County Board of County Commissioners*, 142 F.3d 1319 (10th Cir. 1998). Unlike the Third Circuit, however, which seems comfortable foreclosing federal court review of *landowners'* takings claims, the Tenth Circuit "note[d]" its "concern that *Williamson's* ripeness requirement may, in actuality, almost always result in preclusion of federal claims . . . ." *Id* at 1325 n.4. And the Tenth Circuit noted the "difficult[y] [of] reconcil[ing] the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel." *Id.*

In contrast to the Third, Sixth, Ninth, and Tenth Circuits' wooden application of the FFCA to ripened takings claims, the Eleventh, Fifth, and Fourth Circuits have attempted to reconcile the requirements of the Act with *Williamson County*. In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), the Eleventh Circuit held that the FFCA would not bar a takings claim that had been ripened by prior state court litigation, so long as the landowner filed a "reservation" stating its intent to litigate their federal claims in federal court. The Eleventh Circuit relied on *Jennings v. Caddo Parish School Board*, 531 F.2d 1331 (5th Cir. 1976), where the Fifth Circuit held that such reservations could be used generally to prevent preclusion where a plaintiff has federal claims, but has been "forced to bring . . . constitutional

claims in state court rather than proceed directly to federal court . . . ." *Id.* at 1332. Finally, in *Front Royal & Warren County Industry Park Corporation v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998), the Fourth Circuit agreed with the Eleventh Circuit in *Fields* that a reservation could preserve a federal takings claim when a landowner must first pursue state judicial relief pursuant to *Williamson County*. *Id.* at 283.[8]

The Fourth, Fifth, and Eleventh Circuits derived this "reservation" exception from this Court's opinion in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). There, this Court held that a federal court litigant pushed into state court because of *Pullman* abstention[9] may preserve a federal forum for adjudication of his federal claims by making an on the record "reservation" in state court, which informs the state court that the litigant intends "to return to District Court for disposition of his federal questions." *Id.* at 421.

Despite *England*'s clear analogy to plaintiffs forced into state court by *Williamson County*, the First Circuit conclusorily held in *Griffin v. State of Rhode Island*, 760 F.2d 359 (1st Cir. 1985), that a Section 1983 plaintiff cannot reserve federal issues in state court litigation. *See id.* at 360 n.1. Besides creating further conflict among the circuits, the First Circuit

---

[8] Although the landowner in *Front Royal* had filed no such reservation, the Fourth Circuit, nonetheless, held that its takings claim was ripe because the state courts had considered and rejected the landowner's "possible rights of action for damages." 135 F.3d at 283. Thus, unlike the Third Circuit and the Sixth Circuit here, the Fourth Circuit did not hold that federal courts may only review takings claims to determine whether state proceedings comport with minimal notions of due process.

[9] *See Railroad Comm'n v. Pullman*, 312 U.S. 496 (1941).

failed to mention that in *Migra* this Court expressly recognized that a Section 1983 plaintiff forced into state court could file an *England*-type reservation "to preserve [its] right to a federal forum for [its] federal claims . . . ." 465 U.S. at 85 n.7.

In sum, the intersection of *Williamson County* and the FFCA has spurred conflicts and confusion within and among the circuits. The Third and Sixth Circuits, for example, believe that *Williamson County* stands for the proposition that lower federal courts may only review ripened takings claims for compliance with due process. By contrast, the Ninth and Fourth Circuits have rejected such a constraint on their jurisdiction. Further, the Fourth, Fifth, and Eleventh Circuits have allowed landowners to reserve federal takings claims during the ripening process, while the First Circuit has rejected such reservations. These and other conflicts point to the pressing need for review and clarification by this Court.

C. The Confusion in the Lower Federal Courts Often Denies Landowners *Any* Meaningful Forum in Which to Seek Just Compensation for Confiscation of Their Property

Over two hundred years ago, James Madison opined that "[g]overnment is instituted no less for protection of property than of the persons of individuals." *The Federalist No. 54*, at 339 (James Madison) (Clinton Rossiter ed., 1961), *quoted in Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1579 (Fed. Cir. 1993). This Court recently echoed this observation, noting that the Fifth Amendment Takings Clause drafted by Madison to protect an individual's property rights is no "poor relation" to other constitutional rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

Yet the confusion surrounding *Williamson County* too

often denies landowners any meaningful opportunity to seek just compensation for regulatory takings. The "unclear and inexact" requirements for ripening a federal takings claim[10] often produce lengthy litigation and extraordinary delays in federal court.[11] As a result, "the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small." Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 43 (1995).

And even when a landowner first files a takings claim in state court as *Williamson County* commands, lower federal courts have allowed defendant localities to *remove* such claims from state court. Once removed, these lower federal courts then dismiss the takings claim as *unripe* because the landowner did not seek compensation in state court first. *See, e.g., Schulz v. Milne*, No. 95-15703, 1996 WL 570,498, at *2 (9th Cir. Oct. 3, 1996) (dismissing takings claim that had been removed to federal court as unripe because ripeness is a "jurisdictional question," and the "defendants could not confer subject matter jurisdiction on the district court by removal"); *Seiler v. Charter Township of Northville*, _ F. Supp.2d _, 1999 WL 420,985, at *4 (E.D. Mich. June 23, 1999) (dismissing as unripe takings challenge removed to federal court because removal jurisdiction is "separate and distinct" from the ripeness inquiry, although the court "sympathize[d] with Plaintiff's frustration").

Macri v. King County, 110 F.3d 1496 (9th Cir. 1997), illustrates this ping-pong jurisprudence. In *Macri*, the local government defendant removed the landowners' takings claim to federal court. *See id.* at 1498. Once removed, the local

---

[10] Robert Meltz, Dwight Merriam, & Richard Frank, *The Takings Issue* 67 (1999).

[11] *See, e.g.*, Delaney & Desiderio, *supra* note 7, at 205.

government turned around and had the takings claim dismissed as unripe because the state court had not ruled on that claim. *See Id.* at 1498, 1500. On appeal, the landowners argued that the takings claim should have been remanded "because, unless the federal claim is considered in state court," the landowners would have been "precluded from bringing the federal claim on the basis of res judicata." *Id.* at 1500. Citing *Dodd I*, the Ninth Circuit affirmed because "the failure of a plaintiff to raise a federal takings claim in state court does not preclude that plaintiff from bringing a subsequent federal takings claim in federal court." *Id.* at 1500-01. But, as noted above, the Ninth Circuit subsequently held in *Dodd II* that collateral estoppel *does* preclude a plaintiff from bringing a federal takings claim in federal court.[12]

II. THE LOWER COURT MISAPPLIED *WILLIAMSON COUNTY*, UNASSAILABLE PRECEPTS OF *RES JUDICATA*, AND THIS COURT'S FULL FAITH AND CREDIT ACT JURISPRUDENCE

The FFCA does not empower federal courts to "give state court judgments greater preclusive effect than would the courts of the State rendering the judgment." *Marresse*, 470 U.S. at 384. But that is what the Sixth Circuit has done here. By misreading *Williamson County* and ignoring Tennessee *res*

---

[12] This Court's recent decision in *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523 (1997), will likely exacerbate this forum shuffling. There, this Court held that a local government could remove to federal court a case in which a property owner brought federal constitutional (including takings) and state law challenges to a zoning restriction. *See id.* at 529-34. Local governments will undoubtedly seize upon the opinion to bounce landowners between state and federal courts.

judicata principles, the Sixth Circuit barred the Rainey Brothers' ripened federal takings claim, even though the courts of Tennessee would reach no such result.

Tennessee, in accordance with general *res judicata* precepts, only applies *res judicata* if both the prior and later litigation involved the same "cause of action." *See, e.g., Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 459 & n.11 (Tenn. 1995); 18 Charles Alan Wright et al., *Federal Practice and Procedure: Jurisdiction and Related Matters* § 4406 (1981). For purposes of *res judicata*, "cause of action" means all claims actually litigated as well as claims that could have been litigated. *See, e.g., American Nat'l Bank & Trust Co. v. Clark*, 586 S.W.2d 825, 826 (Tenn. 1979).

Yet the Sixth Circuit ignored that, under *Williamson County*, Rainey Brothers did not, and indeed could not, assert a federal takings claim in the prior state court litigation. Tennessee law, in harmony with settled *res judicata* principles, does not bar subsequent litigation of actions that accrue after the conclusion of prior litigation. *See, e.g., White v. White*, 876 S.W.2d 837, 839 (Tenn. 1994) ("[A] party will not be prejudiced by a judgment as to rights not then accrued."); *Lien v. Couch*, 993 S.W.2d 53, 56 (Tenn. Ct. App. 1998), *permission to appeal denied* (May 10, 1999) ("A prior judgment or decree does not prohibit the later consideration of rights that had not accrued at the time of the earlier proceeding . . . ."); *Restatement (Second) of Judgments* § 20(2) (1982) ("A . . . judgment . . . which rests on the prematurity of the action . . . does not bar another action by the plaintiff instituted after the claim has matured . . . unless a second action is precluded by operation of substantive law."); 18 Charles Alan Wright et al., *supra*, § 4412, at 115 (1999 Supp.) ("Matters that could not be litigated in earlier proceedings because premature also should remain open in later proceedings.") (footnote omitted).

Because a federal takings claim requires an additional element not present until state court proceedings conclude, that claim *does not accrue* until after the conclusion of the state litigation. As this Court held in *Williamson County*, "no constitutional violation *occurs* until just compensation has been denied" in the state court proceedings. 473 U.S. at 194 n.13 (emphasis added). In other words, "the property owner *cannot claim a violation of the Just Compensation Clause* until it has used the [state court] procedure[s] and been *denied* just compensation." *Id.* at 195 (emphasis added). Relying on *Williamson County*, at least three circuits agree that a federal takings claim does not accrue until the state court proceedings have concluded. *See Schulz*, 1996 WL 570,498, at *2; *Bidison v. City of Chicago*, 921 F.2d 724, 728-29 (7th Cir. 1991); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990).

Thus, *res judicata* could not bar Rainey Brothers' federal takings claim, as that claim had not accrued until the state court litigation had concluded. Instead of recognizing this, the Sixth Circuit barred the Rainey Brothers' ripened federal takings claim. In so doing, the Sixth Circuit gave greater preclusive effect to the prior state court litigation than Tennessee *res judicata* principles require and this Court's precedents forbid.

The Sixth Circuit is not alone. In the Ninth and Tenth Circuits, landowners pointed out that the state law *res judicata* principles at issue in their cases also only bar claims actually made or that could have been made, and thus *res judicata* could not bar their claims because such claims, under *Williamson County*, could not have been made until state court proceedings had concluded. *See Wilkinson*, 142 F.3d at 1322-33; *Palomar*, 989 F.2d at 364.

Rather than analyzing the interplay between *Williamson County* and state *res judicata* principles, the lower courts in this case, as well as the Ninth and Tenth Circuits, have employed two strategies. First, they simply ignore the argument. By *ipse dixit*, the lower courts here asserted that a federal takings claim was raised or could have been raised without even bothering to reconcile this conclusion with *Williamson County*. *See* Petitioner's Brief, App. A, at 6; App. B, at 12; *see also, e.g.*, *Wilkinson*, 142 F.3d at 1324; *Peduto*, 878 F.2d at 728. Second, the lower courts here resort to broad language in *McCurry* and *Migra* to the effect that Section 1983 does not offer an "unrestricted opportunity" to relitigate claims raised in state court. *See* Petitioner's Brief, App. B, at 12-13; *see also Palomar*, 989 F.2d at 364.

McCurry and *Migra*, however, are inapposite. In *McCurry*, this Court held that the FFCA required a federal court to apply state collateral estoppel rules to a Section 1983 claim brought for a Fourth Amendment violation when that Fourth Amendment violation had previously been raised in a prior state proceeding. *See* 449 U.S. at 91-105. Subsequently, in *Migra*, this Court held that the FFCA required a federal court to apply state *res judicata* rules to a Section 1983 claim for alleged violations of the First Amendment, Due Process Clause, and Equal Protection Clause. *See* 465 U.S. at 77-88. Neither case, therefore, involved a constitutional violation, such as a takings claim, that requires, as an element of recovery, prior litigation in state court.[13] As already noted, this element of recovery does not accrue until *after* state court proceedings conclude; thus, *McCurry* and *Migra* did not analyze whether the state *res judicata* laws at issue would bar a claim that arises *after* prior state litigation.

---

[13] *See supra* note 4 and accompanying text.

Furthermore, *Migra*, which was decided after *McCurry*, explicitly limited the FFCA's imposition of state *res judicata* rules to cases where the "petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court." 465 U.S. at 84-85. In stark contrast, *Williamson County* prevents takings petitioners from doing precisely that. Accordingly, *Migra* fails to answer the unresolved question of whether the FFCA requires the imposition of state preclusion rules when this Court's jurisprudence requires initial litigation in state court.

CONCLUSION

For the above reasons, the *amicus* respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Of Counsel:
Mary V. DiCrescenzo
Duane J. Desiderio
National Association
of Home Builders
1201 15th St., N.W.
Washington, DC 20005

Gus Bauman
(*Counsel of Record*)
Justin A. Savage
Beveridge & Diamond, P.C.
1350 I St., N.W., Suite 700
Washington, DC 20005
(202) 789-6000

August 4, 1999